

Letter of Findings: 04-20100641; 09-20100639; 10-20100640
Gross Retail Tax, County Innkeeper Tax, Food and Beverage Tax
For the Years 2007, 2008, and 2009

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ISSUES

I. Hotel Accommodations and Meals – Gross Retail Tax / Innkeeper's Tax

Authority: IC § 6-8.1-5-1; IC § 6-2.5-2-1; IC § 6-2.5-4-4; IC § 6-9-8-2; IC § 6-9-12; IC § 6-2.5-5-25; IC § 6-2.5-8-8; IC § 6-9-12-7; IC § 6-2.5-3-7; Indiana Dept. of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); Mynsberge v. Dep't of State Revenue, 716 N.E.2d 629 (Ind. Tax Ct. 1999); Raintree Friends Housing, Inc. v. Indiana Dept. of State Revenue, 667 N.E.2d 810 (Ind. Tax Ct. 1996); [45 IAC 2.2-5-55](#); [45 IAC 2.2-3-25](#); Sales Tax Information Bulletin 10 (June 2008); Sales Tax Information Bulletin 10 (July 2004); Letter of Findings 04-20100498 (January 12, 2011).

Taxpayer argues that it was not required to collect Gross Retail Tax and the Marion County Innkeeper's Tax on the sale of hotel accommodations and meals to not-for-profit entities.

II. Government Agencies – Gross Retail Tax / Innkeeper's Tax

Authority: IC § 6-2.5-5-16; IC § 6-2.5-5-24; IC § 6-8.1-5-4; IC § 6-8.1-5-1; Sales Tax Information Bulletin 4 (May 2010).

Taxpayer claims that it was not required to collect Gross Retail Tax and Marion County Innkeeper's Tax when it rented hotel accommodations to governmental employees.

III. Additional Room Charges – Innkeeper's Tax / Gross Retail Tax

Authority: IC § 6-2.5-4-4; IC § 6-9-8-2; IC § 6-8.1-5-1(c); Greensburg Motel Associates, LP v. Indiana Dep't of State Revenue, 629 N.E.2d 1302 (Ind. Tax Ct. 1994); [45 IAC 2.2-4-8](#); Sales Tax Information Bulletin 41 (September 2010); Sales Tax Information Bulletin 41 (December 2002).

Taxpayer argues that it was not required to collect Innkeeper's Tax and Gross Retail Tax when it charged its customers for various additional room expenses.

IV. Catering and Meals – Food and Beverage Tax

Authority: IC § 6-9-12-3; IC § 6-9-12-4; IC § 6-9-12-7; [45 IAC 2.2-5-55](#); Sales Tax Information Bulletin 7 (May 2002); Sales Tax Information Bulletin 7 (October 2010).

Taxpayer argues that it was not required to collect Marion County Food and Beverage Tax for sales to Not-For-Profits and governmental employees.

STATEMENT OF FACTS

Taxpayer operates a hotel located in Indiana with approximately 240 guest rooms, two restaurants, and meeting and banquet facilities. Additionally, Taxpayer provides catering services and the rental of audio/visual equipment for events at Taxpayer's hotel.

Taxpayer was audited by the Indiana Department of Revenue (hereinafter "Department"). As a result of that audit, the Department issued Proposed Assessments relating to Gross Retail Tax (i.e., Sales Tax), Use Tax, County Innkeeper's Tax, and Food and Beverage Tax. Taxpayer filed a protest regarding the Proposed Assessments. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for the protest. This Letter of Findings results from that hearing.

I. Hotel Accommodations and Meals – Gross Retail Tax / Innkeeper's Tax

DISCUSSION

At the outset, the Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c). Regarding exemptions, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." Indiana Dept. of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

The Department further notes that under IC § 6-2.5-2-1, Indiana imposes a sales tax on retail transactions. IC § 6-2.5-2-1 states as follows:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state. (Emphasis added).

As noted, Taxpayer operates a hotel. Regarding hotels, IC § 6-2.5-4-4 states:

- (a) A person is a retail merchant making a retail transaction when the person rents or furnishes rooms, lodgings, or other accommodations, such as booths, display spaces, banquet facilities, and cubicles or spaces used for adult relaxation, massage, modeling, dancing, or other entertainment to another person:
- (1) if those rooms, lodgings, or accommodations are rented or furnished for periods of less than thirty (30) days; and
 - (2) if the rooms, lodgings, and accommodations are located in a hotel, motel, inn, tourist camp, tourist cabin, gymnasium, hall, coliseum, or other place, where rooms, lodgings, or accommodations are regularly furnished for consideration.
- (b) Each rental or furnishing by a retail merchant under subsection (a) is a separate unitary transaction regardless of whether consideration is paid to an independent contractor or directly to the retail merchant.
- (c) For purposes of this section, "consideration" includes a membership fee charged to a customer.
- (d) Notwithstanding subsection (a), a person is not a retail merchant making a retail transaction if:
- (1) the person is a promoter that rents a booth or display space to an exhibitor; and
 - (2) the booth or display space is located in a facility that:
 - (A) is described in subsection (a)(2); and
 - (B) is operated by a political subdivision (including a capital improvement board established under [IC 36-10-8](#) or [IC 36-10-9](#)) or the state fair commission.

This subsection does not exempt from the state gross retail tax the renting of accommodations by a political subdivision or the state fair commission to a promoter or an exhibitor.

Marion County also imposes an "Innkeeper's Tax" on hotel accommodations. The relevant statute for the "Innkeeper's Tax" is IC § 6-9-8-2, which states in part:

- (a) Each year a tax shall be levied on every person engaged in the business of renting or furnishing, for periods of less than thirty (30) days, any lodgings in any hotel, motel, inn, tourist camp, tourist cabin, or any other place in which lodgings are regularly furnished for a consideration.
- (b) This tax shall be in addition to the state gross retail tax and use tax imposed on such persons by [IC 6-2.5](#). The county fiscal body may adopt an ordinance to require that the tax be reported on forms approved by the county treasurer and that the tax shall be paid monthly to the county treasurer. If such an ordinance is adopted, the tax shall be paid to the county treasurer not more than twenty (20) days after the end of the month the tax is collected. If such an ordinance is not adopted, the tax shall be imposed, paid, and collected in exactly the same manner as the state gross retail tax is imposed, paid, and collected under [IC 6-2.5](#).
- (c) All of the provisions of [IC 6-2.5](#) relating to rights, duties, liabilities, procedures, penalties, definitions, exemptions, and administration shall be applicable to the imposition and administration of the tax imposed by this section except to the extent such provisions are in conflict or inconsistent with the specific provisions of this chapter or the requirements of the county treasurer. Specifically, and not in limitation of the foregoing sentence, the terms "person" and "gross income" shall have the same meaning in this section as they have in [IC 6-2.5](#).
- (d) If the tax is paid to the department of state revenue, the returns to be filed for the payment of the tax under this section may be either a separate return or may be combined with the return filed for the payment of the state gross retail tax as the department of state revenue may determine by rule.
- (e) If the tax is paid to the department of state revenue, the amounts received from this tax shall be paid monthly by the treasurer of state to the treasurer of the capital improvement board of managers of the county upon warrants issued by the auditor of state.

The Marion County Innkeeper's Tax incorporates the "rights, duties, liabilities, procedures, penalties, definitions, exemptions" and administrative procedures set out in IC § 6-2.5. IC § 6-9-8-2(c). If a transaction is exempt for sales tax purposes, it is exempt for purposes of determining the Innkeeper's Tax. Similarly, the Marion County Food and Beverage tax statutes are found at IC § 6-9-12, and also incorporate IC § 6-2.5. As IC § 6-9-12-7 states in part, "The county food and beverage tax shall be imposed, paid, and collected in the same manner that the state gross retail tax is imposed, paid, and collected under [IC 6-2.5](#)."

Sales to Not-For-Profit Organizations

As an initial issue, Taxpayer argues that it is entitled to rely on exemption certificates that it received from not-for-profits thus relieving Taxpayer of the requirement to collect tax on the rental of rooms to not-for-profits. The Audit Report states that in relevant part:

[Taxpayer] also furnished accommodations to guests that included members of not-for-profit organizations and did not collect sales tax on some of these transactions. The audit review confirmed that the taxpayer received an exemption certificate in the name of the not-for-profit organizations and other identification from these guests. However, lodging was not billed or invoiced in the name of not-for-profit organization but instead was billed in the member's name and the member paid the bill.

Taxpayer states that it "provided hotel rooms and meals to NFPs [Not-For-Profit organizations] who provided the Taxpayer with an Indiana General Sales Tax Exemption Certificate" and that "Taxpayer was entitled by statute to rely on those exemption certificates." Taxpayer cites to IC § 6-2.5-5-25. That statute states the following:

- (a) Transactions involving tangible personal property or service are exempt from the state gross retail tax, if

the person acquiring the property or service:

- (1) is an organization described in section 21(b)(1) of this chapter;
- (2) primarily uses the property or service to carry on or to raise money to carry on its not-for-profit purpose; and
- (3) is not an organization operated predominantly for social purposes.

(b) Transactions occurring after December 31, 1976, and involving tangible personal property or service are exempt from the state gross retail tax, if the person acquiring the property or service:

- (1) is a fraternity, sorority, or student cooperative housing organization described in section 21(b)(1)(A) of this chapter; and
 - (2) uses the property or service to carry on its ordinary and usual activities and operations as a fraternity, sorority, or student cooperative housing organization.
- (Emphasis added).

The Department notes that IC § 6-2.5-5-25, as a tax exemption provision, is strictly construed against the taxpayer. *Mynsberge v. Dep't of State Revenue*, 716 N.E.2d 629, 636 (Ind. Tax Ct. 1999).

Taxpayer further cites to IC § 6-2.5-8-8, stating "that a NFP can issue an exemption certificate on exempt purchases, and the seller 'has no duty to collect or remit the state gross retail or use tax' on that purchase." IC § 6-2.5-8-8 states:

- (a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.
 - (b) The following are the only persons authorized to issue exemption certificates:
 - (1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter;
 - (2) organizations which are exempt from the state gross retail tax under [IC 6-2.5-5-21](#), [IC 6-2.5-5-25](#), or [IC 6-2.5-5-26](#) and which are registered with the department under this chapter; and
 - (3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.
 - (c) The department may also allow a person to issue a blanket exemption certificate to cover exempt purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt.
 - (d) A seller that accepts an incomplete exemption certificate under subsection (a) is not relieved of the duty to collect gross retail or use tax on the sale unless the seller obtains:
 - (1) a fully completed exemption certificate; or
 - (2) the relevant data to complete the exemption certificate; within ninety (90) days after the sale.
 - (e) If a seller has accepted an incomplete exemption certificate under subsection (a) and the department requests that the seller substantiate the exemption, within one hundred twenty (120) days after the department makes the request the seller shall:
 - (1) obtain a fully completed exemption certificate; or
 - (2) prove by other means that the transaction was not subject to state gross retail or use tax.
- (Emphasis added).

Taxpayer also cites to IC § 6-2.5-3-7(b) and [45 IAC 2.2-3-25](#), and argues that it has a "statutory right to rely on the exemption certificates...." Taxpayer's argument assumes that it accepted proper exemption certificates for the transactions at issue—as will be seen below, the exemption certificates were not proper.

IC § 6-2.5-8-8(a) states that, "The person shall issue the certificate on forms and in the manner prescribed by the department" and that "[a] seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase." (Emphasis added). The form prescribed by the Department is "Form ST-105" which states in Section 3:

Sales to **nonprofit organizations** claiming exemption pursuant to Sales Tax Information Bulletin #10. (May not be used for personal hotel rooms and meals.)

And Sales Tax Information Bulletin 10 (June 2008), 20080702 Ind. Reg. 045080515NRA, states:

For a purchase by a nonprofit organization to qualify for exemption, the article purchased must be used for the same purpose as that for which the organization is being exempted. **Purchases for the private benefit of any member of the organization or for individuals, such as meals and lodgings, are not eligible for exemption.**

EXAMPLE: A nonprofit organization is hosting a 3 day convention for its members in Indianapolis. The organization rents meeting rooms in a hotel to conduct its educational meetings. The rental of the rooms will be exempt from the sales tax and local innkeepers' tax if applicable.

Sales of meals during a meeting of the organization are taxable because the meals are provided for the convenience of the organization and its members. Such meals are taxable even when served in conjunction with a meeting which is furthering their nonprofit purpose.

At the same convention, the organization reserves and pays for, out of its treasury, the cost of four hotel rooms to be used by its officers for lodging. The lodgings provided for the officers by the organization are not exempt from the sales tax or the innkeepers' tax if applicable. The rental of rooms for its officers or members is a private benefit for the individual and is not for the purpose for which the organization exists. (Bold and italics in the original).

And Sales Tax Information Bulletin 10 (July 2004), 27 Ind. Reg. 3385, states:

In order for a purchase by a nonprofit organization to qualify for exemption, the article purchased must be used for the same purpose as that for which the organization is being exempted. Purchases for the private benefit of any member of the organization or for individuals, such as meals and lodgings, are not eligible for exemption. If a member of the organization purchases a meal or lodging, even if the member is to be reimbursed by the organization, the purchase is not exempt, and the member must pay sales tax at the time of the purchase. Purchases used for social purposes are never exempt.

[45 IAC 2.2-5-55\(b\)\(3\)](#) also states in pertinent part, "Purchases for the private benefit of any member of the organization or for any other individual, such as meals or lodging, are not eligible for exemption."

And as the Department recently noted in Letter of Findings 04-20100498 (January 12, 2011):

The Department's stated position on the issue appears to be clear and consistent. Purchases for the private benefit of any member of a not-for-profit organization are not eligible for exemption and hotel room accommodations – secured for a not-for-profit's member – are inherently a "private benefit." Any "benefit" obtained by the sponsoring not-for-profit organization is tangential at best. As stated in Sales Tax Information Bulletin 10, [20100929-IR-045100600NRA](#), "Purchases for the private benefit of any member of the organization or for individuals, such as meals and lodgings, are not eligible for exemption." As explained in Letter of Findings 04-20090967 (April 29, 2010), "[E]ach exempt hotel room rental consists of two steps. The first step is to present a properly completed exemption certificate. The second step is to present payment by the exempt organization or governmental organization and confirm that the exemption certificate is actually being used by the exempt organization listed on the exemption certificate. Both steps are necessary and are immediately verifiable. These steps are verifiable by any retail merchant, including but not limited to hotels." See also Letter of Findings 04-20091028 (April 29, 2010).

Taxpayer also cites to a prior LOF issued in 2006 by the Department in support of its protest. Regarding that 2006 LOF, the Department has stated in the LOF issued on January 12, 2011:

Taxpayer cites to Letter of Findings 04-20060286 (December 18, 2006) addressing the imposition of sales tax on transactions which occurred during 2003 and 2004. That Letter of Findings states that, "[T]he taxpayer received exemption certificates from the non-profit members and is thus relieved from the liability for failure to collect." Nonetheless, the Department's "General Sales Tax Exemption Certificate," (ST-105) since August 2005 has specifically stated that the exemption applies to "Sales to nonprofit organizations claiming exemption pursuant to Sales Tax Information Bulletin [] 10" but that the exemption may "not be used for personal hotel rooms and meals."

Letter of Findings 04-20100498 (January 12, 2011). Thus Taxpayer's protest regarding its reliance on the exemption certificates is denied. Taxpayer has not met its burden of showing that the exemption certificates that it accepted were proper per IC § 6-2.5-8-8.

Taxpayer next argues that "[e]ven if the Taxpayer had not received exemption certificates, it would still not be liable on exempt transactions, as the rental of hotel rooms and purchase of meals to 'carry on' the purposes of the NFP are exempt transactions." Taxpayer states:

[T]he sales tax provisions for not-for-profit entities are based on the federal income tax definition of not-for-profit entities and the determinations by the federal income tax authorities that such entities are exempt from tax for federal income tax purposes.

Taxpayer goes on to further assert:

If the rental of a hotel room or purchase of a meal by a NFP is a deductible business expense under Section 162 of the Internal Revenue Code, then it is an expense incurred in "carrying on" the business of the NFP and is exempt under I.C. § 6-2.5-5-25 and is not a "personal" use.

Taxpayer, in making this argument, relies on federal income tax concepts for an Indiana sales tax situation. As previously noted, [45 IAC 2.2-5-55\(b\)\(3\)](#) says in pertinent part, "Purchases for the private benefit of any member of the organization or for any other individual, such as meals or lodging, are not eligible for exemption." Also, [45 IAC 2.2-5-55\(b\)\(4\)](#) states:

The fact that an organization is being exempted by the federal government or by the state of Indiana for income tax purposes does not necessarily mean that a purchase made by the not-for-profit organization is exempt.

And, as noted in the quotation from Letter of Findings 04-20100498:

The Department's stated position on the issue appears to be clear and consistent. Purchases for the private benefit of any member of a not-for-profit organization are not eligible for exemption and hotel room accommodations – secured for a not-for-profit's member – are inherently a "private benefit."

In the present case, Taxpayer's protest is denied.

Meals, Food and Beverages and Not-For-Profits

The Audit Report states that "the hotel catered events for not-for-profit organizations" and that "[o]n numerous occasions, when an exemption certificate was provided indicating that the organization was not-for-profit, tax was not collected on catered meals, food and beverages." The Audit Report also states, "In most cases, the taxpayer was unable to present evidence to establish that the prepared meals, food and beverage purchases were provided for an exempt purpose as prescribed by the regulations."

Regarding this issue, Taxpayer refers generally to an Indiana Tax Court case—Raintree Friends Housing, Inc. v. Indiana Dept. of State Revenue, 667 N.E.2d 810 (Ind. Tax Ct.1996). Taxpayer does not develop its argument regarding the relevance of Raintree to Taxpayer's facts. However, Taxpayer does state that in Raintree "[t]he Indiana Tax Court recognized that a NFP was exempt from sales tax on food under IC § 6-2.5-5-25 and from the Marion County food and beverage tax under IC § 6-9-12-4."

The Raintree case involved not-for-profit retirement homes. The Indiana Tax Court found that:

In as much as the Housing Corporations are exempt from gross income tax under I.C. 6- 2.1-3-20(a), their sales of food are also exempt from gross retail tax under IND. CODE 6-2.5-5-25 and IND. CODE 6-2.5-5-26(b). Furthermore, by virtue of being exempt from the gross retail tax, Home Place is exempt from the Marion County food and beverage tax under IND. CODE 6-9-12-4. Likewise, Raintree is exempt from the Henry County food and beverage tax by virtue of being exempt from the gross retail tax.

Id. at 816-17 (footnotes omitted). The facts in Raintree are dissimilar to Taxpayer's facts. First, Raintree involved retirement homes, not hotels (regarding retirement homes, the Indiana Tax Court stated: "The Retirement Homes provide a benefit to society by catering to the specific needs of their aged residents and by providing community, security, and assisted living for those in need[.]" Id. at 815). Secondly, the retirement homes themselves were the not-for-profit taxpayers claiming exemption; Taxpayer, a hotel, is a for-profit entity. Thirdly, the Indiana Tax Court stated:

[T]he Housing Corporations' not-for-profit status is not disputed nor is it disputed that the Housing Corporations do not use gross income for private benefit or gain. What is disputed, however, is that the Housing Corporations are operated exclusively for charitable purposes. (Emphasis added).

Id. at 813. In Taxpayer's case, the issue of private benefit (in the context of sales tax) is at issue—Taxpayer has been assessed tax because it furnished lodgings and meals exempt from tax that were for the private benefit of members of not-for-profit organizations. As Sales Tax Information Bulletin 10 states, "Purchases for the private benefit of any member of the organization or for individuals, such as meals and lodgings, are not eligible for exemption." The example provided by the most recent version of Sales Tax Information Bulletin 10 states:

Sales of meals during a meeting of the organization are taxable because the meals are provided for the convenience of the organization and its members. Such meals are taxable even when served in conjunction with a meeting which is furthering their nonprofit purpose.

Given all of the above, Taxpayer has not met its burden to show that the sales of rooms and/or meals qualify for exemption.

FINDING

Taxpayer's protest is respectfully denied.

**II. Government Agencies – Gross Retail Tax / Innkeeper's Tax
DISCUSSION**

The Audit Report states that at the hotel "lodging was furnished to guests who are local, state, and federal government employees. The hotel granted an exemption to tax on the room rentals for some of these employees."

Taxpayer cites to IC § 6-2.5-5-16, stating that it "provides an exemption from sales tax with respect to the State of Indiana and its agencies, instrumentalities, political subdivisions." That statute states:

Transactions involving tangible personal property, public utility commodities, and public utility service are exempt from the state gross retail tax, if the person acquiring the property, commodities, or service:

- (1) is the state of Indiana, an agency or instrumentality of the state, a political subdivision of the state, or an agency or instrumentality of a political subdivision of the state, including a county solid waste management district or a joint solid waste management district established under [IC 13-21](#) or [IC 13-9.5-2](#) (before its repeal); and
- (2) predominantly uses the property, commodities, or service to perform its governmental functions.

The Department's "ST-105" states, "Sales to **Indiana Governmental Units** (agencies, cities, towns, municipalities, public schools, and state universities)." Thus the exemption applies to governmental units, not individuals. Sales Tax Information Bulletin 4 (May 2010), 20100526 Ind. Reg. 045100330NRA, states it thusly:

If a state or local employee purchases an item, and even if the employee is to be reimbursed by the governmental entity, the purchase is not exempt and the employee must pay sales tax at the time of purchase. [See also Sales Tax Information Bulletin 4 (August 2008), 20080827 Ind. Reg. 045080656NRA; Sales Tax Information Bulletin 4 (July 2007), 20070801 Ind. Reg. 045070434NRA; and Sales Tax Information Bulletin 4, (May 2002), 25 Ind. Reg. 3931, which have similar language].

Turning to the issue of the federal government employees, Taxpayer cites to IC § 6-2.5-5-24 "with respect to sales to the federal government." Sales Tax Information Bulletin 4 (May 2010), in relevant part, explains the Department's position regarding the sales tax and the federal government:

The United States Constitution prohibits any state from imposing any tax directly on the U.S. government or any of its agencies, unless the Congress consents to being taxed. Thus, much federal purchasing, leasing, and renting of tangible personal property; the use of utilities; meals consumed in restaurants; and other normally taxable goods or services (including accommodations for fewer than 30 days) are exempt from Indiana sales and other transaction-based taxes.

However, the fact that the U.S. government may ultimately reimburse an employee who paid the tax does not exempt such a purchase from tax. For example, if an employee of the Internal Revenue Service pays for lodging costs from his own funds, tax should be collected at the time of payment. But if the same employee pays for the lodging with a credit card in the name of and billed directly to the Internal Revenue Service, this is a direct expenditure by the U.S. government. Therefore, this is exempt from the sales tax. A vendor is not required to collect sales tax on sales made directly to the U.S. government if the exemption can be verified by documenting the facts and circumstances of the transaction. [See also Sales Tax Information Bulletin 4 (August 2008), and Sales Tax Information Bulletin 4 (July 2007), which have similar language].

The Audit Report states:

The audit confirmed that government employees provided the hotel with exemption certificates in the name of the governmental entity as well as other identification. However, the audit also found that in a number of cases other pertinent documentation was not available to support the taxpayer's tax exempt treatment of employees. [...] An audit adjustment is being made to impose sales tax on exempted lodging in which no proof was provided to substantiate that rooms furnished were a direct rental to and paid directly to a governmental unit as opposed to employees of the agency.

Taxpayer argues that it is "prohibited by federal law from retaining photographs of identification of employees on a federal governmental agency." Taxpayer also argues that:

The fact that the individual remits payment and then gets reimbursed by the government, as opposed to a direct bill to the government, is a distinction without a difference, as the exemption statutes are not limited to "direct billing."

Taxpayer does not cite to any controlling Indiana Tax Court cases or 7th Circuit cases to that effect. The cases that Taxpayer cites to are from other, non-controlling jurisdictions such as the 9th Circuit, etc. The Department notes, however, that there are also cases from other, non-controlling jurisdictions that have reached conclusions different from the argument made by Taxpayer. For instance, in *Keystone Auto Leasing, Inc. v Norberg*, 486 A.2d 613 (R.I. 1985) the Rhode Island Supreme Court stated:

In our view, in situations in which federal employees lease automobiles and pay with cash or personal credit cards, the legal incidence of the tax is on the employees and not on the federal government. We conclude, therefore, that petitioners are not immune from state taxation and that the rentals in question constituted a taxable event.

Id. at 616.

The Court of Appeals of Maryland, in *Comptroller of the Treasury v. World Inns, Inc.*, 528 A.2d 477 (Md.1987), also stated:

It is clear from United States Supreme Court precedent that constitutional intergovernmental tax immunity is only properly granted when the legal incidence of a state tax falls directly on the United States. It is also clear that when a state statute requires a seller to collect a sales tax from a purchaser, the legal incidence of that tax falls on the purchaser. The Maryland Retail Sales Tax Act defines "purchaser" as "any person... to whom services are rendered." § 324(c). The Act requires the "vendor to collect from the purchaser" a five percent sales tax on the rental of any hotel room. §§ 325, 324(f)(5). In the case at bar, the federal employees were the "purchasers" within the meaning of the Act. They contracted directly with World Inns for the rental of rooms and paid for the rooms with their personal funds. The federal government was in no sense a party to the room rental arrangement. Consequently, the legal incidence of the tax fell on the employees and not on the United States. We therefore hold that because the legal incidence of the tax did not fall directly on the United States, or its agencies or instrumentalities, the rentals of hotel rooms by federal employees in this case were not immune from state sales tax.

Id. at 480-1 (footnote omitted).

As noted in Sales Tax Information Bulletin 4 "[a] vendor is not required to collect sales tax on sales made directly to the U.S. government if the exemption can be verified by documenting the facts and circumstances of the transaction." It is, however, Taxpayer's burden to provide sufficient documentation that the federal government was directly billed for the purchases (See IC § 6-8.1-5-4 regarding books and records; IC § 6-8.1-5-1(c) regarding burden of proof). Even if Taxpayer is correct, based on the article it provided from the "U.S. Army North Provost Marshal" that photocopying of U.S. Government identification is not allowed (Taxpayer also makes a similar argument regarding government issued credit cards), Taxpayer must still provide some other type of documentation to sufficiently verify that the federal government was directly billed. Taxpayer has not done so.

In addition, Taxpayer's protest regarding other non-federal government employees is also denied. As Sales Tax Information Bulletin 4 states, "If a state or local employee purchases an item, and even if the employee is to be reimbursed by the governmental entity, the purchase is not exempt and the employee must pay sales tax at the time of purchase."

FINDING

Taxpayer's protest is respectfully denied.

III. Additional Room Charges – Innkeeper's Tax / Gross Retail Tax DISCUSSION

The Department initially notes that it is not clear if Taxpayer is protesting sales tax and Marion County Innkeeper's Tax, or only the latter. For instance, Taxpayer states that the relevant statutes "do not impose sales tax or innkeeper's tax on movie rentals or on long distance markup charges." But in a subsequent letter to the Department, Taxpayer's argument seems to relate to the Marion County Innkeeper's Tax (the same analysis regarding lodging applies to both the sales tax and innkeeper's tax, thus the analysis below is applicable to either argument).

The Audit Report states:

The hotel collects a separate charge for in-room movie rentals as well as long distance telephone services related in conjunction with the occupancy of rooms. During the audit period, the taxpayer collected sales tax on the in-room movie rentals and telecommunication charges but failed to collect the county innkeeper's tax on those transactions.

Taxpayer, in turn, states:

The Taxpayer rents accommodations, a hotel room, and charges a fixed price for the room. Many guests incur no other charges. To the extent that they do, it is because the guest has made a **unilateral independent decision**, at its option, to incur an extra, different charge for an extra, difference service, including watching a movie or using a telephone.

(Bold in the original).

Taxpayer then states, "Indiana Code § 6-2.5-4-5 [sic], and the Marion County Innkeeper's Tax (I.C. § 6-9-8-2), impose sales tax an innkeeper's tax on the rental of 'lodging.'" Taxpayer also cites to "Webster's Dictionary" for a definition of lodging.

IC § 6-2.5-4-4 provides:

(a) A person is a retail merchant making a retail transaction when the person rents or furnishes rooms, lodgings, or other accommodations, such as booths, display spaces, banquet facilities, and cubicles or spaces used for adult relaxation, massage, modeling, dancing, or other entertainment to another person:

- (1) if those rooms, lodgings, or accommodations are rented or furnished for periods of less than thirty (30) days; and
- (2) if the rooms, lodgings, and accommodations are located in a hotel, motel, inn, tourist camp, tourist cabin, gymnasium, hall, coliseum, or other place, where rooms, lodgings, or accommodations are regularly furnished for consideration.

(b) Each rental or furnishing by a retail merchant under subsection (a) is a separate unitary transaction regardless of whether consideration is paid to an independent contractor or directly to the retail merchant.

(Emphasis added).

In addition, [45 IAC 2.2-4-8](#) states:

(a) For the purpose of the state gross retail tax and use tax: Every person engaged in the business of renting or furnishing for periods of less than thirty (30) days any accommodation including booths, display spaces and banquet facilities, in any place where accommodations are regularly furnished for a consideration is a retail merchant making retail transactions in respect thereto and the gross income received therefrom shall constitute gross retail income from retail unitary transactions.

(b) In general, the gross receipts from renting or furnishing accommodations are taxable. An accommodation which is rented for a period of thirty (30) days or more is not subject to the gross retail tax.

(c) There is no exemption for purchases made by persons who are engaged in renting or furnishing accommodations. Such persons are deemed to purchase or otherwise acquire tangible personal property for use or consumption in the regular course of their business.

(d) The renting or furnishing of an accommodation for less than thirty (30) days constitutes a retail merchant making a retail transaction. Every person so engaged must collect the gross retail tax on the gross receipts from such transactions. The tax is borne by the person or organization who uses the accommodation.

(e) The tax is imposed on the gross receipts from "furnishing" an accommodation. The gross receipts subject to tax include the amount which represents consideration for the rendition of those services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation. Such amounts are subject to tax even when they are separately itemized on the statement or invoice.

(Emphasis added).

The "any accommodation" language of [45 IAC 2.2-4-8\(a\)](#) would also include lodging. Regarding

"accommodation," Sales Tax Information Bulletin 41 (December 2002), 26 Ind. Reg. 928, states in relevant part: "Accommodation" means any space, facility, structure, or combination thereof including booths, display spaces and banquet facilities, together with all associated real or personal property which is intended for occupancy by persons for a period of less than thirty (30) days. The term includes the following:

- Rooms in hotels, motels, lodges, ranches, villas, apartments, houses, bed and breakfast establishments, and vacation homes or resorts. [See also Sales Tax Information Bulletin 41 (September 2010), 20100929 Ind. Reg. 045100600NRA, for similar language].

Turning to the Marion County Innkeeper's statute, IC § 6-9-8-2 states:

- (a) Each year a tax shall be levied on every person engaged in the business of renting or furnishing, for periods of less than thirty (30) days, any lodgings in any hotel, motel, inn, tourist camp, tourist cabin, or any other place in which lodgings are regularly furnished for a consideration.
- (b) This tax shall be in addition to the state gross retail tax and use tax imposed on such persons by [IC 6-2.5](#). The county fiscal body may adopt an ordinance to require that the tax be reported on forms approved by the county treasurer and that the tax shall be paid monthly to the county treasurer. If such an ordinance is adopted, the tax shall be paid to the county treasurer not more than twenty (20) days after the end of the month the tax is collected. If such an ordinance is not adopted, the tax shall be imposed, paid, and collected in exactly the same manner as the state gross retail tax is imposed, paid, and collected under [IC 6-2.5](#).
- (c) All of the provisions of [IC 6-2.5](#) relating to rights, duties, liabilities, procedures, penalties, definitions, exemptions, and administration shall be applicable to the imposition and administration of the tax imposed by this section except to the extent such provisions are in conflict or inconsistent with the specific provisions of this chapter or the requirements of the county treasurer. Specifically, and not in limitation of the foregoing sentence, the terms "person" and "gross income" shall have the same meaning in this section as they have in [IC 6-2.5](#).
- (d) If the tax is paid to the department of state revenue, the returns to be filed for the payment of the tax under this section may be either a separate return or may be combined with the return filed for the payment of the state gross retail tax as the department of state revenue may determine by rule.
- (e) If the tax is paid to the department of state revenue, the amounts received from this tax shall be paid monthly by the treasurer of state to the treasurer of the capital improvement board of managers of the county upon warrants issued by the auditor of state.

(Emphasis added).

Under IC § 6-2.5-4-4 lodgings of less than thirty days are charged sales tax; and under IC § 6-9-8-2(c) "the provisions of [IC 6-2.5](#)" apply—thus the Innkeeper's Tax is treated like IC § 6-2.5-4-4.

In its argument that the "pay-per-view, pay-per-day" movies and long distance telephone use are not part of lodging, Taxpayer states that these "are not required purchases as part of a hotel stay, are not included in the charge for a room...." Taxpayer further argues that:

Because these are independent decisions resulting in separate charges for the property or services purchased, they are not for "lodging" or "accommodations."

Taxpayer also argues:

The Marion County Innkeeper's Tax is a tax on "lodging." It would be applicable to items included within the charge for the room (e.g., complementary shampoo), but it is not applicable to charges incurred due to independent, optional decisions made by a guest.

The Department notes the case of Greensburg Motel Associates, LP v. Indiana Dep't of State Revenue, 629 N.E.2d 1302 (Ind. Tax Ct. 1994). In Greensburg Motel the Indiana Tax Court discussed a motel operator's claim that consumable items, non-consumable items, and utilities were exempt from sales tax under the resale exemption. Specifically, the Greensburg Motel Associates case stated:

In *Indiana Bell Telephone Co. v. Indiana Department of State Revenue*, 627 N.E.2d 1386 (Ind. Tax Ct. 1994), the court, quoting *USAir v. Indiana Department of State Revenue*, 542 N.E.2d 1033 (Ind. Tax Ct. 1989), *aff'd* 582 N.E.2d 777 (Ind. Tax Ct. 1992), stated "[t]o subdivide the cost of [an airline] ticket into percentages to cover the various services rendered by the airline... strain[s] the meaning of the term 'resale.' When a passenger buys a ticket he buys many services." 627 N.E.2d at 1389. Likewise, when a guest rents a room from Lees Inns, the guest buys the benefits of many services, including consumable items, non-consumable items, and utilities. Accordingly, it is an artificial conclusion to divide the cost of Lees Inns' room rental into resales and leases.

Greensburg Motel, 629 N.E.2d at 1305.

Taxpayer, in the present case, attempts to distinguish its in-room movie rentals and long distance telephone use. Regarding *Greensburg Motel Associates*, Taxpayer states:

In those cases, the Indiana Tax Court recognized that the single charge cannot be artificially "subdivided" among the items provided for that single charge (i.e., the room charge cannot be artificially allocated among the complimentary shampoo, condition, and soap; the furniture, the utilities, etc.). For a single price, the guest is entitled to a hotel room, and all that comes with it for that single price.

The Department does not agree with Taxpayer's argument regarding the subdividing of the in-room movie

rentals and long distance telephone use. The Department finds that the in-room movie rentals and long distance telephone use are a regular part of furnishing accommodations. The 2002 Sales Tax Information Bulletin 41 puts it thusly:

The tax is imposed on the gross receipts received by the retail merchant and include the amount which represents consideration for the rendition of those services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the room or accommodation. Such amounts are subject to tax even if they are separately itemized on the statement or invoice. This includes telephone access charges. It also includes food or drinks provided by the retail merchant to the customer, if it is included in the room charge. If there is a membership fee charged to the customer, it is included in gross receipts.

(Emphasis added) [See also Sales Tax Information Bulletin 41 (September 2010), for similar language].

FINDING

Taxpayer's protest is respectfully denied.

IV. Catering and Meals – Food and Beverage Tax

DISCUSSION

In its protest letter Taxpayer also protests the "Marion County Food and Beverage Tax." Taxpayer states in its protest letter:

The Department's auditor assessed Marion County food and beverage tax on sales of food to NFPs [Not-For-Profits] and government entities for the same reasons as described... for the Department's auditor's assessments of sales tax and innkeepers tax.

Marion County Food and Beverage Tax is found at IC § 6-9-12-3, which states:

(a) Subject to section 4 of this chapter, the tax imposed under this chapter applies to any transaction in which food or beverage is furnished, prepared, or served:

- (1) for consumption at a location, or on equipment, provided by a retail merchant;
- (2) in a county in which a consolidated first class city is located; and
- (3) by a retail merchant for a consideration.

(b) Transactions described in subsection (a)(1) include, but are not limited to transactions in which food or beverage is:

- (1) served by a retail merchant off his premises;
- (2) food sold in a heated state or heated by a retail merchant;
- (3) two (2) or more food ingredients mixed or combined by a retail merchant for sale as a single item (other than food that is only cut, repackaged, or pasteurized by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the federal Food and Drug Administration in chapter 3, subpart 3-401.11 of its Food Code so as to prevent food borne illnesses); or
- (4) food sold with eating utensils provided by a retail merchant, including plates, knives, forks, spoons, glasses, cups, napkins, or straws (for purposes of this subdivision, a plate does not include a container or packaging used to transport the food).

IC § 6-9-12-4 provides for an exemption, stating: "The county food and beverage tax does not apply to the furnishing, preparing, or serving of any food or beverage in a transaction that is exempt, or to the extent exempt, from the state gross retail tax imposed by [IC 6-2.5](#)." IC § 6-9-12-7 states in part, "The county food and beverage tax shall be imposed, paid, and collected in the same manner that the state gross retail tax is imposed, paid, and collected under [IC 6-2.5](#)."

Since the "county food and beverage tax shall be imposed... in the same manner" as the sales tax, the preceding portions of this LOF are applicable to Taxpayer's food and beverage argument. For instance, regarding Not-For-Profits, see Section I of this LOF. Additionally, the Department notes that Sales Tax Information Bulletin 7 (May 2002), 25 Ind. Reg. 3933, states in part that "Sales tax must be collected whether the individual members are charged separately or the organization pays the entire cost in a single payment...." Further, Sales Tax Information Bulletin 7 states that:

Except as provided in paragraph "III" below, food and beverage services are never considered to be used for the purpose for which an organization might otherwise be granted sales tax exemption.

Paragraph "III" in the Information Bulletin states in relevant part:

If a qualified nonprofit organization purchases the meals and pays the entire cost in a single payment and the meals are sold by them individually at a higher price as a part of a bona fide fund raising project the proceeds of which are used for the purpose for which such organization is granted exemption from sales tax, such organization is not required to either pay or collect sales tax....

The 2010 Sales Tax Information Bulletin 7 (October 2010), 20101124 Ind. Reg. 045100710NRA, states:

If a qualified nonprofit organization purchases the meals and pays the entire cost in a single payment and the meals are sold by the organization individually at a higher price as a part of a bona fide fundraising project, the proceeds of which are used for the purpose for which such organization is granted exemption from sales tax, such organization is not required to either pay or collect sales tax, if sales are not made on more than 30

days in a year.

Further, [45 IAC 2.2-5-55](#)(b)(3) states: "Purchases for the private benefit of any member of the organization or for any other individual, such as meals or lodging, are not eligible for exemption." (Emphasis added). And the Department has already addressed and analyzed Sales Tax Information Bulletin 10 (which states, "Sales of meals during a meeting of the organization are taxable because the meals are provided for the convenience of the organization and its members. Such meals are taxable even when served in conjunction with a meeting which is furthering their nonprofit purpose."). Taxpayer has failed to establish that the catered meals sold to Not-For-Profits were exempt.

Regarding governmental employees, the same analysis provided in Section II of this LOF is applicable. For federal employees, Taxpayer must provide some type of documentation to sufficiently verify that the federal government was directly billed. For other governmental employees (i.e., non-federal), Taxpayer's argument is also denied (See Sales Tax Information Bulletin 4 regarding state and local employees purchases and reimbursement).

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer's protests relating to Gross Retail Tax, Marion County Innkeeper's Tax, and the Marion County Food and Beverage Tax are respectfully denied.

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